Supreme Court, U.S.
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No. 97-1351

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

GLADSTONE MESSAM,

Petitioner,

vs.

WILLIS MORTON, SUPERINTENDENT OF THE NEW JERSEY STATE PRISON, AND THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether petitioner is barred from raising for the first time in his petition for certiorari the issues of whether a state appellate court's findings regarding what arguments counsel had made are entitled to a presumption of correctness and whether, under certain circumstances, Miranda warnings are a prerequisite to the validity of a consent to search?

2) Whether trial counsel was ineffective for not asserting a frivolous motion to suppress statements petitioner had made in response to open-ended, general investigatory questions when he was not in custody and admission of the statements furthered the defense that the police had targeted petitioner?

3) Whether Miranda warnings are ever an absolute indispensable prerequisite to finding that an accused's consent to a search is voluntary when an accused's consent to a search is not an incriminatory statement and can only reveal physical, not testimonial, evidence?

4) Whether the Court of Appeals for the Third Circuit correctly interpreted the record which disclosed petitioner's motive for killing the victim and physical evidence which linked petitioner to the murder?

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BRIEF ON BEHALF OF THE RESPONDENTS IN OPPOSITION

Respondents, Willis E. Morton, Superintendent of the New Jersey State Prison, and the Attorney General of the State of New Jersey respectfully request that this Court deny the petition for writ of certiorari filed by the petitioner, Gladstone Messam, seeking review of the decision of the United States Court of Appeals for the Third Circuit (Third Circuit) that was filed on November 19, 1997.

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COUNTER-STATEMENT OF THE CASE

Solely to prevent his wife from discovering that he had an affair with his 20-year-old employee, Rhonda Daye (Rhonda), and had fathered her unborn child, petitioner made good on his threat to "get rid of her and the baby one way or the other" and butchered the 4 months pregnant Rhonda to death by stabbing her a total of 31 times. Seven courts, including the Third Circuit, have either explicitly or

implicitly held that petitioner has failed to establish his ineffective assistance of counsel claim.

I. Factual Background

Petitioner, a married man with two children, owned a Subway sandwich shop in Newark, New Jersey and a Big Bite sandwich shop in Orange, New Jersey. Rhonda worked as a sandwich maker in these shops and lived in an apartment, which was rented by petitioner's brother, above the Subway.

Petitioner and Rhonda were having an affair. In April, 1984, Rhonda became pregnant by petitioner. Rhonda wanted to have the baby. Petitioner, however, "was upset due to the fact that {Rhonda} was pregnant and that she wanted to have the baby." In July, 1984, Rhonda had to stop working because of medical problems caused by her pregnancy.

When petitioner rebuffed Rhonda's plea for money for necessities, Mary Daye, Rhonda's mother, telephoned petitioner and asked him to "help{}" Rhonda because Mary Daye "didn't have the money to buy the food and stuff

that {Rhonda} needed." Petitioner told Mary Daye that "he didn't have any money and all he could give her was bread..."

Also, petitioner refused to sign paperwork to enable Rhonda to obtain unemployment benefits. Then, petitioner and Rhonda had a fight or "got into it." Rhonda hit petitioner with a brick. Upset that Rhonda wanted the baby, petitioner told Rhonda that "he'd get rid of her and the baby one way or the other." On September 17, 1984, petitioner again refused to give Rhonda money after he had promised to do so. Petitioner and Rhonda "had a big fight," after which Rhonda thought petitioner "got the message."

On Monday, September 24, 1984, Detective Gary Miller of the Newark Police Department's Homicide Squad responded to a call at 85 South Orange Avenue. Upon entering the abandoned building located there, Detective Miller saw Rhonda's dead body, nude from the waist up. She had been stabbed 31 times in the chest and neck. There were also cuts on her face

and hands. Rhonda's body was lying on "the inside of the inner wall of the window sill" of a window. Detective Miller observed "drippings" of blood on the window sill.

Outside, Detective Miller observed a trail of blood from the curbside to the window sill. In the immediate vicinity of the building, Detective Miller saw a bloodstained envelope and 3 bloodstained paper invoices, all bearing the words "Subway Sandwich Shop." Other items discovered by the detective in this area included a bloodstained red and white box with popcorn, a bloodstained green comb, a bloodstained Tropicana orange juice box and a bloodstained tire.

On September 25, 1984, Mary Daye went to the Subway sandwich shop to find Rhonda. She saw petitioner who told Mary Daye that he had not seen Rhonda since Saturday. Mary Daye immediately thereafter saw two detectives and reported that her daughter was missing. Mary Daye was taken to police headquarters and saw Detective Miller. Mary Daye took Detective Miller to Rhonda's apartment.

A torn note was found in the garbage bag underneath the kitchen sink. When pieced together, this note, in relevant part, read:

> Dear Pearl {petitioner's wife}, {P}lease understand I never meant to hurt you. I am sorry. ...Well, Ms. Messam, I had an affair with your husband. Please I regret it now. ...Ms. Messam, I am pregnant by your husband. I am sorry. He promised me happiness and peace of mind. ...{N}ow he treats me like a complete stranger and won't help me get anything to eat and to feed my unborn baby. ...To find who I am, come to the Subway or ask your husband.

Inside Rhonda's bedroom, Detective Miller found a half-finished note to Mrs. Messam in a notebook with petitioner's address on the inside cover. Recovered from Rhonda's wallet were materials from a prenatal center and an envelope from unemployment. Mary Daye then identified Rhonda's body. Police interviews with Mary Daye and Rhonda's cousin, Beverly Jones, corroborated that Rhonda was pregnant and petitioner wanted Rhonda to abort the child.

Detective Miller and his partner went to the Subway store to interview petitioner. Detective Miller told petitioner that "Rhonda Daye was missing and we wanted to talk to him." Detective Miller also told petitioner that Rhonda had been last seen on Friday.

When asked by the detectives, petitioner agreed to go to police headquarters to provide a statement. Petitioner proposed to drive himself to headquarters in his 1982 Honda, but agreed that Detective Miller could ride with him.

Before either one entered, petitioner moved a pile of papers from the passenger side front seat to the back seat of the car. Detective Miller saw bloodstains on the papers which were on top of the pile.

At the police station, Detective Miller questioned petitioner without advising him of his Miranda rights. Petitioner disclosed that he had last seen Rhonda the previous Friday and that Rhonda had worked at his sandwich shops but no longer did because she was

pregnant. Petitioner revealed to Detective Miller that Rhonda was "just a friend." Petitioner acknowledged that Rhonda had told him that he was the "father of her child."

Detective Miller asked petitioner about "the bloodstained papers in the car." Petitioner answered that he "didn't know about them," but admitted that nobody else had used the Honda since the previous Thursday, September 20, 1984. Detective Miller then asked for permission to search the Honda. Petitioner, who is college-educated, read a consent to search form, listened to the detective read it aloud, then signed it.

Detective Miller's search of the Honda produced 12 pieces of bloodstained paper and 2 bloodstained coffee mugs, one of which had popcorn inside of it. Detective Miller also noticed small spots of blood on the passenger side tire, the passenger side door, the front fender and the hood. A notebook containing an unfinished letter from Rhonda to Mrs. Messam was found in the trunk.

After the search, Detective Miller noticed blood stains on the brush tan leather work boots petitioner was wearing. Detective Miller then advised petitioner of his Miranda rights. When the detective asked petitioner from where the blood stains on his boots came, petitioner told him that he "didn't want to talk anymore."

Forensic testing revealed the presence of two enzymes differentiating the victim's blood from that of petitioner. The blood on the mug which did not contain the popcorn, 2 envelopes and 1 paper found in petitioner's car and 1 envelope and 1 paper recovered from the scene was consistent with Rhonda's blood but inconsistent with petitioner's blood. Blood with this combination of enzymes occurs in only 3.8% of the black population. Rhonda was black.

II. Procedural History

On the State's interlocutory appeal of the order entered by the state trial court which suppressed all evidence which was not in plain view, the state Appellate Division, on

February 13, 1987, reversed the trial court's order. The Appellate Division held that petitioner had voluntarily consented to the search of his car, thus all evidence recovered from petitioner's vehicle was admissible.

The jury found petitioner guilty of murdering Rhonda and related weapons offenses on January 13, 1989. Petitioner was sentenced to life imprisonment with a 30 year parole disqualifier.

Petitioner unsuccessfully appealed his convictions through the state court system. His attempt to disturb his convictions on collateral review in the state courts was equally unavailing. Petitioner then unsuccessfully applied to the United States District Court for a writ of habeas corpus.

The District Court issued a certificate of appealability even though its July 31, 1996 opinion did not hint that any of petitioner's claims was the least bit meritorious. Before the Third Circuit, petitioner argued that his trial attorney was ineffective for the following reasons:

he did not adequately argue the suppression motion, failed to move to suppress the statements petitioner had made at the stationhouse and improperly elicited hearsay testimony. On November 19, 1997, the Third Circuit issued an opinion affirming the District Court's denial of petitioner's application for a writ of habeas corpus.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE STATE COURT FINDINGS REGARDING MATTERS APPARENT FROM THE RECORD ARE NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS AND PETITIONER'S EXPERIENCED TRIAL COUNSEL WAS EFFECTIVE AND PACKAGED A COHERENT DEFENSE CENTERING ON THE POLICE'S ALLEGED WILLINGNESS TO GO TO ANY LENGTHS TO PIN THIS MURDER ON PETITIONER

I. Summary of Argument

"The likelihood of success of a motion {or argument} ...is directly relevant to the question of whether the failure to make it constitutes inadequate assistance of counsel." United States v. Madewell, 917 F.2d 301, 304 (7th Cir. 1990). Petitioner's experienced and respected attorney,

whom the trial judge described as "very competent," was not required to assert factors which had no capacity to vitiate the voluntariness of petitioner's consent to the search of his car nor file a spurious motion to suppress statements petitioner made when he was not subjected to interrogation nor in custody.

Admission of the petitioner's stationhouse statements furthered the defense that the police were so bent on targeting petitioner that they would manufacture just about anything to get him. Admission of the hearsay statement about Rhonda hitting petitioner with a brick advanced petitioner's counsel's attempt to portray this otherwise sympathetic victim in an unsympathetic light. "{C}ourts will not find that an attorney is incompetent for using a particular approach to a case so long as that approach was reasonable." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994), cert. den., 513 U.S. 1022 (1994). Petitioner is barred from now raising for the first time

that the presumption of correctness attaches to a state court's findings as to what arguments counsel had made and that, under certain circumstances, Miranda warnings are a prerequisite to a valid consent to search.

II. The presumption of correctness does not attach to a state court's findings as to what arguments counsel had made.

This Court generally "refrain{s} from addressing issues not raised in the Court of Appeals." Equal Employment Opportunity Commission v. Federal Labor Relations Authority, 476 U.S. 19, 24 (1986); Holly Farms Corporation v. National Labor Relations Board, ____ U.S. ____, 116 S.Ct. 1396, 1402, n.7 (1996). Petitioner now alleges that the state Appellate Division's finding on interlocutory appeal that petitioner's lawyer only presented the absence of Miranda warnings to support his claim that petitioner's consent to the search was involuntary should be presumed to be correct. Petitioner had never asserted this argument before the Third Circuit or any other court. As

such, petitioner should be barred from raising this argument for the first time before this Court.

The presumption of correctness only attaches to a state court's factual finding whose "resolution depends heavily on the trial court's appraisal of witness credibility and demeanor." Thompson v. Keohane, ____ U.S. ____, 116 S.Ct. 457, 465 (1995). As was stated in Miller v. Fenton, 474 U.S. 104, 114 (1985), a "state trial judge is in a position to assess {credibility and demeanor} that is far superior to that of federal judges reviewing an application for a writ of habeas corpus."

In stark contrast, the determination of what arguments counsel had made in support of petitioner's suppression motion is not "peculiarly within a trial judge's province." Wainwright v. Witt, 469 U.S. 412, 428 (1985). A federal court collaterally reviewing petitioner's case can discern what arguments counsel had proffered in support of a motion by simply reviewing the record.

As the Third Circuit observed, "{T}he district court correctly noted that {petitioner's lawyer} specifically argued to the Appellate Division that Mr. Messam was in custody, that he should have been given Miranda warnings, and that the police misled him as to the reason he was at the police station." It is doubtful that three judges of the Third Circuit as well as the District Court judge misapprehended the record.

Petitioner contends that the Court of Appeals's failure to accept the finding regarding what arguments petitioner's attorney had advanced prevented it from deciding the ultimate issue of whether or not counsel provided ineffective assistance. This argument overlooks that no other factor besides those alleged by petitioner's lawyer conceivably bore on the voluntariness of the consent given by this savvy, college-educated, 39-year-old petitioner who voluntarily went to police headquarters, was advised of his right to refuse consent and was not threatened or coerced in any manner.

Petitioner was twice explicitly told that he could refuse to consent to the search of his car. This is strong evidence of the voluntariness of petitioner's consent. United States v. Mendenhall, 446 U.S. 544, 558 (1980). The police only sporadically questioned petitioner at the police station before asking for his consent to search. There is not a shred of proof that petitioner had been coerced. Petitioner's voluntary decision to go to police headquarters highlights that the police did not in any way threaten him. Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

The police's failure to inform petitioner that Rhonda had died does not constitute deception. As the Third Circuit explained, "While police deception can be a factor indicating coercion, the police are not required to inform a suspect of the full extent of their knowledge or investigation."

New Jersey courts have traditionally afforded criminal defendants more protection than the federal courts in the area of search

and seizure. In the context of consent searches, New Jersey courts have held that an accused's consent to a search is involuntary if he is not advised of his right to withhold consent. State v. Johnson, 68 N.J. 349 (1975). As such, it was reasonable for petitioner's lawyer to try to make new law and stress that Miranda warnings are required under New Jersey law before a consent to search given in an allegedly custodial setting can be held to be voluntary.

III. Miranda warnings are not a prerequisite to a valid consent to search because such consent does not implicate the right against self-incrimination.

Petitioner alleges that, since he was in custody and subjected to interrogation, Miranda warnings were required to render his consent to the search voluntary. This argument not only misconstrues case law but is diametrically opposed to petitioner's claim that counsel was ineffective for only asserting the absence of Miranda warnings in support of his motion to

suppress the fruits of petitioner's allegedly involuntary consent to search. Petitioner never raised this argument before, thus he is barred from asserting it now for the first time.

Miranda warnings are not an indispensable prerequisite to a valid consent to search. Hubbard v. Jeffes, 653 F.2d 99, 103-104 (3rd Cir. 1981); United States v. Ritter, 752 F.2d 435, 438-439 (9th Cir. 1985). As was explained in Cody v. Solem, 755 F.2d 1323, 1330 (8th Cir. 1985), cert. den., 474 U.S. 833 (1985):

> "{T}he fifth amendment right to counsel is not an independent right; rather it stems from the privilege against self-incrimination." Simply put, a consent to search is not an incriminating statement. Cody's consent, in and of itself, is not evidence which tends to incriminate him. While the search taken pursuant to that consent disclosed incriminating evidence, this evidence is real and physical, not testimonial. {citations omitted}

An accused's consent to a search remains non-testimonial even when he

provides said consent while he is in custody.

Petitioner overlooks that Miranda simply did not apply. The general, open-ended investigatory questions the police asked petitioner did not amount to interrogation. Police are permitted to ask a suspect "a few brief questions designed to confirm or alleviate their suspicions" without informing him of his Miranda rights. United States v. Gale, 952 F.2d 1412, 1416 (D.C. Cir. 1992), cert. den., 503 U.S. 923 (1992); Florida v. Royer, 460 U.S. 491, 497 (1983). "{T}he mere fact that a police officer may be aware that there is a 'possibility' that a suspect may make an incriminating statement is insufficient to establish the functional equivalent of interrogation." United States v. Taylor, 985 F.2d 3, 8 (1st Cir. 1993), cert. den., 508 U.S. 944 (1993).

After asking petitioner "where the blood stains came from," Detective Miller questioned petitioner whether "anyone else used his car or drove his car ...since last Thursday." Petitioner

answered, "{N}o." Detective Miller's questions did not "center blameworthiness on the {petitioner}." State v. Barnes, 54 N.J. 1, 6 (1969), cert. den. 396 U.S. 1029 (1970).

Petitioner was not in custody at the time he disclosed that no one else had used or driven the Honda since September 20, the Thursday before Rhonda's death. Petitioner's freedom of action was not curtailed to a degree associated with formal arrest. California v. Beheler, 463 U.S. 1121, 1125 (1983). There was absolutely nothing about the words or conduct of the police which would have led petitioner to reasonably believe that he was not free to leave or ignore the detective's queries and "go about his business." Florida v. Bostick, 501 U.S. 429, 434 (1991). Petitioner had not been restrained in any way. There is not a scintilla of evidence that the police intimidated petitioner or ever displayed force.

Petitioner's voluntary decision to go to police headquarters speaks volumes for a finding of non-custody.

Yount v. Patton, 710 F.2d 956, 961 (3rd Cir. 1983), rev'd on other grounds, 467 U.S. 1025 (1984); Mathiason, supra at 492. Likewise, petitioner's recommendation that he drive his Honda to the police station and voluntary decision to permit Detective Miller to drive with him bespeaks of a petitioner who was fully in control of the situation.

Admission of petitioner's statements furthered the defense that the police would go to any lengths to pin this murder on petitioner. Defense counsel packaged the evidence into the themes of sloppy police work and Detective Miller's alleged willingness to lie. Petitioner's attorney in his summation called the police investigation a "tragedy." He emphasized that petitioner's wife, petitioner's brother and the allegedly undesirable "low-lives" with whom the victim associated were never investigated. Petitioner's lawyer stressed, "There are too many people and motives and suspects that nobody did anything about..."

Counsel hammered away at the theme that Detective Miller "lied to everybody" and urged the jury during his closing argument, "The big question for you is ...did he lie to you?" Petitioner's attorney's goal was to put Detective Miller and the victim on trial. He was not merely attempting to poke holes in the State's case but attempted to shift the focus of the trial from petitioner to the victim and Detective Miller.

IV. The Court of Appeals's ruling that petitioner suffered no prejudice was based on a correct interpretation of the record which disclosed petitioner's motive to murder the victim and physical evidence linking petitioner to the murder.

Petitioner alleges that the Third Circuit's holding that petitioner was not prejudiced by any alleged ineffectiveness on the part of his trial counsel is based on a misinterpretation of the record. It is petitioner who misconstrues the record which reeks of evidence of petitioner's guilt.

The Third Circuit held that petitioner's trial attorney effectively argued the suppression motion. The Court believed it was unnecessary to express an opinion as to whether counsel's decisions to elicit hearsay and not to move to suppress petitioner's stationhouse statements constituted ineffective assistance because petitioner was not in any way prejudiced by those decisions.

During cross-examination of Ms. Jones, Rhonda's cousin, defense counsel asked her about Rhonda hitting petitioner with a brick. Ms. Jones, on re-direct examination, testified about the fight and was allowed to reveal, over the objection of petitioner's lawyer, that "-And Rhonda told me that {petitioner} said she wasn't going to have the baby, that he'd get rid of her and the baby one way or the other."

The brick incident "dirties up" the victim and tied in with petitioner's attorney's attempt to portray the otherwise sympathetic victim in an unsympathetic light. It is consistent with the defense theme

that the alleged "low-lives" with whom the victim associated may have killed her. The hearsay also showed petitioner's peaceful reaction to violence. He responded to physical force with words, not violence. It is even questionable whether counsel could have anticipated that admission of evidence of the brick incident would have "opened the door" to the admission of petitioner's verbal threat because it is unclear how much time elapsed between the brick incident and petitioner making the verbal threat.

Even if the jury had not considered the bloodied items recovered from the Honda which were not in plain view, petitioner's stationhouse comments and the hearsay, the Third Circuit held that the State "would have nevertheless presented the jury with substantial evidence of Mr. Messam's guilt." The jury still would have received petitioner's trial testimony that he had an affair with Rhonda and that Rhonda claimed the child was his. Also, the jury would have heard petitioner's trial testimony that his

wife had suspected him of having an affair with Rhonda and they had fought about it "several times." Additionally, the jury would have had the following evidence for its consideration: 1) Rhonda's notes, 2) petitioner's refusal to help Rhonda, 3) expert testimony that the blood on petitioner's work boots was of human origin, 4) bloodstained papers bearing the name "Subway Sandwich Shop" that were found near Rhonda's body, and 5) "expert testimony that {Rhonda} was not killed at the vacant building but rather killed elsewhere in a brutal confrontation, dragged to the vacant building, and dumped through the window (suggesting that Mrs. Messam could not have been the killer)."

Petitioner incorrectly asserts that only the blood recovered from the coffee mug linked him to the murder. Blood from 3 envelopes and 2 papers additionally tested consistently with the victim's blood but inconsistently with petitioner's blood. In sum, other evidence which winds a golden thread of guilt around petitioner would have been

admitted even if counsel had made different strategic decisions.

CONCLUSION

It is unjust to microscopically examine defense counsel's actions years after conviction, then nitpick his decisions and elevate any phantom error into a constitutional violation impairing the trial's fairness. As was explained in State v. White, 260 N.J.Super. 531, 540 (App. Div. 1992), certif. den., 133 N.J. 436 (1993):

> It would tear at the very roots of trial counsel's responsibility were we to routinely question the soundness of strategic decisions long after they were made. An attorney's strategic and tactical determinations must have consequences. If such decisions can later be challenged by a disgruntled litigant and a reversal obtained, trial counsel will have little motivation to carefully consider the alternative courses he or she may take. Indeed, the client, and derivatively the attorney, may ultimately derive a benefit by virtue of a tactical blunder.

"Every book must have its final chapter. This saga too must end." Id. at 591. Petitioner's own epic, authored by his own handiwork the day he senselessly butchered Rhonda to death, must also end. Respondents respectfully request that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

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